IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 496 of 1998

For Approval and Signature:

HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE S.R.BRAHMBHATT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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Versus

STATE OF GUJARAT

Appearance:
1. Criminal Appeal No. 496 of 1998
MR BS SUPEHIA for Appellant No.
THROUGH JAIL for Appellant No.
MR RM CHAUHAN APP for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE S.R.BRAHMBHATT

Date of decision: 16/03/2005

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE J.M.PANCHAL)

Instant appeal, filed under Section 374(2) of the Code of Criminal Procedure, 1973, is directed against judgment dated March 12, 1998 rendered by the learned Additional City Sessions Judge, Court No.14, Ahmedabad, in Sessions Case No.153 of 1997 by which the appellant is convicted of the offences punishable under Section 302 and 498A of the Indian Penal Code and sentenced to suffer RI for life and fine of Rs.1,000/= in default RI for 3 months for commission of offence punishable under Section 302 of IPC as well as RI for 3 years for commission of offence punishable under Section 498A of the IPC.

2 The appellant was married to Mominabibi. The appellant was subjecting his wife to physical and mental cruelty. The appellant had given talaq to his wife. Therefore, Mominabibi had approached Abdulsalam Abdulgafur Ansari who is one of the members of a Social Organisation known as Aman Committee. Abdulsalam Abdulgafur Ansari and other members of Aman Committee had taken up the case of the deceased Mominabibi with Kazi. The Kazi had declared that talaq given by the appellant to his wife was invalid. With the intervention of members of Aman Committee a sort of understanding was arrived at between the appellant and deceased pursuant to which the deceased was living together with the appellant. As per the terms of understanding the appellant was to give Rs.1500/= per month towards domestic expenses to the deceased whereas deceased was to live with the appellant and look after household affairs. The incident in question took place on February 24, 1997. On the day of the incident the appellant administered sedatives to the deceased and after making her unconscious he strangulated her to death by means of her scarf. The incident in question was witnessed by daughter of the appellant named Rukhsana Mohmadnasim. The appellant after committing the murder of the deceased locked the room from outside and met Mohmadalam early in the morning at 5 AM informing him that his wife died because she had taken excessive dose of medicines. In the morning of February 24, 1997 Mohmadalam and other members of the Aman Committee went to the house of the appellant and found that the deceased was lying dead inside the room. Before opening room they thought it fit to inform the police and therefore went to the police station where they learnt that police had already gone to the house of the appellant. Abdulsalam Ansari attempted to give the complaint regarding murder of the deceased by the appellant but initially the police refused to record the complaint and asked Abdulsalam Ansari to wait till the result of post mortem examination of the dead body of

the deceased was available. The post mortem examination of the deceased indicated that the deceased was strangulated to death and therefore the complaint lodged by Abdulsalam Ansari was registered. After necessary investigation, the appellant was charge-sheeted in the court of the learned Metropolitan Magistrate, Court No.15, Ahmedabad, for commission of offence punishable under Section 302 and 498A of the Indian Penal Code.

3 As the offence punishable under Section 302 of IPC is exclusively triable by a Court of Sessions, the case was committed to the City Sessions Court, Ahmedabad, for trial where it was numbered as Sessions Case No.153 of 1997. The learned Additional City Sessions Judge, Court No.14, to whom the case was made over for trial, framed necessary charge against the appellant at exh.1. It was read over and explained to him. He pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined (1) Abdulsalam Abdulgafur Ansari as P.W.No.1 at exh.8; (2) Abdulsalim Abdulgafur as P.W.No.2 at exh.10, (3) Noorjahan Ummarali Saiyed as P.W.No.3 at exh.13; (4) Aliyarkhan Mirkhan as P.W.No.4 at exh.15, (5) Mahemoodalam Mohmadyasin as P.W.No.5 at exh.17; (6) Rajbahadur Nathusingh, as P.W.No.6 at exh.18; (7) Jitendrakumar Kantilal Mehta, as P.W.No.7 at exh.19; (8) Rameshkumar Hiralal, as P.W.No.8 at exh.20; (9) Child Witness Rukshana Mohmadnasim, as P.W.No.9 at exh.21; (10) Dr Hasumati Ranchhodbhai Patel, as P.W.No.10 at exh.22; (11) Prafulbhai Maganbhai, as P.W.No.11 at exh.24; and (12) Ambalal Chhotalal Patel, as P.W.No.12 at exh.31 to prove its case against the appellant. The prosecution also produced documentary evidence such as complaint lodged by Abdulsalam Abdulgafur Ansari at exh.9, inquest report of the deceased exh.14, panchnama of the place of the incident at exh.16, post mortem notes of the deceased at exh.23, panchnama indicating seizure of clothes of deceased at exh.23, discovery of the scarf made pursuant to the disclosure statement made e by the appellant at exh.27, panchnama of seizure of cover of pillow at exh.28, report of the FSL at exh.29, etc. in support of its case against the appellant.

4 After recording of the evidence of the prosecution witnesses was over, the learned Judge explained to the appellant the circumstances appearing against him in the evidence of the prosecution witnesses and recorded his further statement as required by Section 313 of the Criminal Procedure Code, 1973. In his further statement, the appellant claimed that the case of the prosecution that after committing murder of his wife he

had locked the room from outside and had not handed over the key to his daughter - Rukshana Nasim was false and it was stated by him that he had handed over the key to his daughter - Rukshana Nasim. What was claimed by the appellant in his further statement was that on the day of the incident he had gone to offer prayer to God from where he had visited the theater to see a movie and had returned home at about 1.30 AM and had found his wife dead when the door of his room was opened by his daughter. However, no defence evidence was adduced by the appellant.

5 On appreciation of evidence adduced by the prosecution, the learned Judge held that it was proved by the prosecution beyond reasonable doubt that the appellant had subjected his wife - deceased Mominabibi to physical as well as mental cruelty and therefore commission of offence punishable under Section 498A of the IPC by the appellant was established. It was further held by the learned Judge that the appellant had administered tranquiliser pills to his wife and thereafter strangulated her to death with her scarf as a result of which commission of offence punishable under Section 302 was also established against the appellant. In view of above-referred to conclusions, the learned Judge has convicted the appellant under Section 302 and 498A of the Indian Penal Code and imposed sentences referred to above by the judgment dated 12th March, 1998 giving rise to instant appeal.

6 Mr B.S.Supehia, learned counsel of the appellant, contended that the learned Judge of the trial court was not justified in placing reliance on the testimony of child witness - Rukshana Mohmad Nasim for the purpose of basing conviction of the appellant under Section 302 of the IPC inasmuch as in her first statement made before the police it was not stated by her that her father had strangulated her mother to death. According to the learned counsel for the appellant, in view of the contradictions appearing in the testimony of child witness - Rukshana her evidence should be disbelieved. What was asserted by the learned counsel of the appellant was that the learned Judge of the trial court was not justified in coming to the conclusion that the appellant had made extra judicial confession before the witness Mohmad Alam Mohmad Yasin and therefore unwarranted conviction of the appellant shall be set aside. It was further argued that the evidence on record does not indicate that the appellant had strangulated his wife to death and therefore the impugned judgment deserves to be set aside. According to the learned counsel, the learned

Judge of the trial court has failed to appreciate the evidence on record in its true perspective and therefore the appeal should be allowed.

7. Mr R.M. Chauhan, learned APP, contended that the case against the appellant stands satisfactorily proved by reliable testimony of child witness - Rukshana Nasim and therefore well-founded conviction of the appellant should not be interfered with by this Court in instant appeal. It was argued by learned APP that the extra judicial confession proved by witness - Mohmad Alam Mohmad Yasin also establishes that the appellant had strangulated the deceased to death and therefore well founded conviction of the appellant should be upheld by this Court. The learned counsel of the State Government referred to the testimony of Dr Hasumati Patel and contended that her evidence shows that deceased was strangulated to death as a result of which the conviction of the appellant should be maintained by this Court. What was stressed by the learned APP before the Court was that cogent and convincing reasons have been assigned by the learned Judge of trial Court for convicting the appellant under Sections 302 and 498A of the IPC and as the learned counsel of the appellant has failed to dislodge them, the appeal, which lacks merits should be dismissed.

8 This Court has heard Mr B.S.Supehia, learned counsel of the appellant, as well as Mr R.M. Chauhan, learned APP, for the State at length and in great detail. This Court has also undertaken a complete and comprehensive appreciation of all vital features of the case as well as the entire evidence on record with reference to broad and reasonable probabilities of the case.

9 As mentioned earlier, the defence of the appellant was that deceased had died because she had taken excessive drugs. However, testimony of Dr Hasumati Ranchhodbhai Patel, who had performed autopsy on the dead body of the deceased does not indicate that the deceased had committed suicide. On the contrary, her evidence positively establishes that the deceased was strangulated to death. Her evidence recorded at exh.22 makes it more than clear that she had performed autopsy on the dead body of the deceased on February 24, 1997 and found external as well as internal injuries on the dead body of the deceased. What is mentioned by the medical officer in her testimony before the Court is that there was fracture in greater corn bone and ligature mark was visible on front of neck from thyroid cartilage. Further

the prosecution has produced report of FSL at exh.29. It inter-alia indicates that no poison was found in stomach of the deceased. Under the circumstances, there is no manner of doubt that it is proved by the prosecution beyond pale of doubt that the deceased died a homicidal death.

10 The case against the appellant stands fully established by the testimony of child witness - Rukshana Mohmadnasim, which is recorded at exh.21. It may be stated that the witness was minor and therefore in order to satisfy himself that the child witness understood the sanctity of the statement made before the Court certain questions were put by the learned Judge to the child witness which were properly answered by her and therefore her testimony was recorded on oath. The child witness has stated that she was residing with her parents and sister and brother at Millatnagar. According to her, the incident had taken place between night of February 23, 1997 and February 24, 1997. What is mentioned by her is that she was woken up as she had heard the noise of striking of legs on floor by her mother. According to this witness, she had seen that her father i.e. appellant was strangulating neck of the deceased with her scarf. It is also mentioned by the child witness that thereafter her father had asked her to go to sleep but she had not gone sleep at all. What is asserted by the witness is that thereafter after locking every one inside the room the appellant had gone away and taken with him the key of lock. According to this witness he had asked her father appellant to hand over the key but the appellant had not handed over the key to her. During the course of recording of her examination-in-chief the witness was shown the clothes, which were put on by her mother at the time of incident and those clothes were identified by this witness as belonging to her mother. The witness was also shown dark purple coloured scarf, which was seized during the course of investigation and after looking at the scarf it was stated by the witness that it was the same scarf with which the appellant had strangulated her mother to death.

11 In her cross-examination it is stated by the witness that her house consisted of one room and that all were sleeping in one room. The suggestion made by the defence that in her first police statement she had stated that her mother was suffering from stomach problem for the last two years, is accepted by her. However, she has explained that such a fact was mentioned by her in the said statement because her father had asked her not to narrate the incident to any one. It may be mentioned

that the second police statement of this witness was recorded on the very day and in her second police statement it was clearly mentioned by her that her mother was strangulated to death by her father. It was suggested to the witness by the defence that after locking the door from outside the appellant had gone away at about 4 AM and that she had not informed the neighbours is accepted by the witness. The reason given by her for not informing the neighbours was that her father had asked her not to inform any one about the incident. However, it is the case of the defence itself that the appellant had gone away after locking the door from outside which also accepted by the witness. It means presence of the appellant at the place and time of incident as almost admitted by the appellant. Though this child witness is cross-examined at length nothing could be brought on record to impeach her credibility. No major contradictions and/or omissions could be brought on record with reference to her second police statement. In fact, this witness is daughter of the appellant and therefore would not involve the appellant falsely in the case and/or allow the real culprit of her mother to go scot-free. A bare glance at the testimony of this witness makes it evident that she has stated the facts in most natural manner without making any noticeable improvements and/or embellishment. The tests which have been laid down by the Supreme Court from time to time regarding acceptability of the evidence tendered by a child witness stand fully satisfied in the case of child witness Rukshana Nasim. Her case also gets corroboration from the testimony of Dr Hasumatiben who had performed autopsy on the dead body of the deceased. The testimony of the Medical Officer who had performed the autopsy on the dead body of the deceased establishes beyond pale of doubt that the deceased was strangulated to death. The learned Judge of the trial court who had advantage of observing demeanour of the witnesses has rightly believed the testimony tendered by child witness Rukshana Nasim and no good ground is made out by the learned counsel for the appellant to disbelieve her testimony. Under the circumstances, the finding recorded by the learned Judge of the trial Court that it is proved by the prosecution through the testimony of child witness Rukshana Nasim that the appellant had strangulated the deceased to death is found to be just and is hereby upheld.

12 Further the case of the prosecution stands proved by the testimony of witness - Mohmad Alam Mohmad Yasin, which is recorded at exh.17. This witness has asserted in his testimony before the Court that from hospital he was returning with the appellant and one Salamuddin in a

rickshaw after the dead body of the deceased was handed over to the doctor for post mortem examination. The witness has stated before the Court that Salamuddin, who was staying in Sarangpur had alighted from the rickshow and thereafter in the said rickshaw he was returning with the appellant. What is asserted by the witness before the Court is that he had asked the appellant in rickshaw to disclose the true facts to him and the appellant had informed him that he had administered sedatives to his wife and thereafter strangulated her to death. Though this witness is also cross-examined at length nothing could be brought on record, which would create a doubt about his assertion that the appellant had made extra-judicial confession before him. This witness is very well known to the appellant and therefore the claim of this witness that the appellant had confided in him and had made clean breast of every thing deserves acceptance. Thus, this Court finds that the learned Judge of the trial Court did not commit any error in acting upon the testimony of witness Mohmad Alam for coming to the conclusion that the appellant had made extra-judicial confession before him, which proves his guilt.

13 As noticed earlier, the case of the appellant is that at the time of the incident he had gone to offer prayers to God and thereafter visited a theater to see a movie and was not present in the house at all. Thus, what is pleaded by the appellant is alibi. Statutory illustration appended to Section 103 of the Evidence Act, 1872 would indicate that burden to prove alibi is on the accused. The plea of alibi postulates the physical impossibility of the presence of the accused at the scene of accused by reason of his presence at another place. The plea can therefore succeed only if is shown that the accused was so far away at the relevant time that he could not be present at the place where the crime was committed. The appellant has not adduced any evidence worth the name to probablise his defence of alibi. On the contrary, the reliable testimony of his daughter Rukshana Nasim recorded at exh.21 unerringly establishes that the appellant was present in the room and that after strangulating his wife to death had left the room and locked the same from outside. Further, the defence of the appellant was that the deceased had died as she had consumed excessive dose of medicines. If that was so, it was not necessary for him to go away after locking the room outside. This strange conduct of the appellant coupled with false defence which is taken up by the appellant is also a factor to be considered by the Court.

14 On reappreciation of the evidence adduced by the prosecution, this Court is of the opinion that there is no manner of doubt that the appellant had subjected his wife to physical as well as mental cruelty. The testimony of witness Abdulsalam Abdulgafur Ansari, recorded at exh.1, and Abdulsalim Abdulgafur recorded at exh.10 and Noorjahan, recorded at exh.13, would show that the deceased was subjected to cruelty by the appellant. As noticed earlier, the conviction of the appellant under Section 302 is found to be eminently just. On the facts and in the circumstances of the case, this Court is of the firm opinion that the conviction of the appellant under Section 302 and 498A of the Indian Penal Code is well-founded and no ground is made by the appellant to interfere with the same in instant appeal. Therefore, the appeal, which lacks merits is liable to be dismissed.

15 For the foregoing reasons, the appeal fails and is dismissed. The Muddamal be disposed of in terms of the directions given by the learned Judge in the impugned judgment.

(J.M. Panchal, J.)

(S.R.Brahmbhatt, J.)

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